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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 431

CONE BROTHERS CONTRACTING COMPANY, A CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. 15–25) is unreported. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 189–238, 256–260) [1] are reported at 114 N. L. R. B. No. 62; its prior decision in the representation proceeding (R. 148–151) is reported at 109 N. L. R. B. 483.

JURISDICTION

The judgment of the court below was entered on June 22, 1956 (R. 256). A petition for rehearing

[1] The symbol "R" refers to the Transcript of Record printed as Volume I pursuant to the rules of the court below; the symbol "A" refers to the joint appendix filed in the court below.

was denied on July 20, 1956 (Pet. 2). The petition for a writ of certiorari was filed on September 17, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the Board abused its discretion in a "run-off" election, held three weeks after the original election, by limiting voting eligibility, in accordance with its established practices and rules, to those employees still employed who were eligible to vote in the original election.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, et seq.), and of the Regulations adopted pursuant thereto, are set forth in the Appendix, *infra*, pp. 11–12.

STATEMENT

Briefly, petitioner refused to bargain with the United Stone and Allied Product Workers of America, CIO (herein called the Union), notwithstanding the Board's certification of that organization as bargaining representative of petitioner's employees. Petitioner claimed that the certification was improperly issued because the Board in a run-off election, necessitated by the failure of any choice to receive a majority in the first election, had limited voting eligibility to those still employed who were eligible to vote in the first election. The detailed facts giving rise to this issue may be summarized as follows:

Following a hearing on the Union's petition for a representation election, the Board issued an order on

January 21, 1954 directing that an election be held within 30 days (R. 68, 76–80). The order recited that petitioner's production and maintenance employees who were employed during the payroll period immediately preceding the date of the Order, January 21, 1954, and who were still employed on the day of the election, were eligible to vote, and that the ballot would afford three choices: the Union, the International Union of Operating Engineers (herein called "the Engineers"), which also claimed to represent the employees, and "No Union" (R. 79–80).

Thereafter, the Company, on February 3, filed with the Board a motion requesting clarification of the appropriate unit, and an extension of 30 days from the date of the Direction in which to allow the Regional Director to run the election (R. 81–84). In the latter connection, the Company pointed to difficulties encountered in making arrangements for the election, referring, among other things, to the fact that balloting at a number of locations would be required (R. 83). On February 11, the Board amended its previous order by granting the relief prayed for by the Company substantially as requested (R. 85–86).

Subsequently, the Company advised the Board that March 17 had been agreed upon by the parties as the date for the election, and that the last payroll before January 21, the date of the Board's Direction, closed on January 20. The Company asserted that since January 20, the eligibility date thus fixed by the Board's Direction, there had been substantial turnover among its employees, and it asked the Board to substitute March 10 as the eligibility date (R. 88, 93).

The Union, in turn, notified the Board that it had no objection to a later eligibility date but opposed one beyond February 20 (R. 90). By telegraphic order dated March 4, the Board disposed of this matter by again amending its Direction, instructing the Regional Director to conduct the election among employees who were employed during the payroll period immediately preceding March 1 (R. 95). This amendment had the effect of establishing February 27 as the eligibility date (R. 96).

On March 17 the election was held at a number of Company locations (R. 97–112). No choice received a majority; the Union and "Neither" tied at 129 votes for each, the Engineers received 77, and 11 ballots were challenged (R. 113–114).

Because the first election did not result in a majority for any choice, the statute required that a run-off election be held in which the Engineers would be omitted from the ballot and the employees would be presented with the choice of voting for or against the Union.[2] Under the Board's rules, the eligibility date of February 27 was to be retained and applied to the run-off.[3] On March 18, a day following the inconclusive election, the Company once more wrote the Board, acknowledging that a run-off was necessary and point-

[2] Section 9 (c) (3) provides in pertinent part: "In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election."

[3] The rule, reprinted at 29 CFR 102.62, provides: "Employees who were eligible to vote in the [original] election and who are employed in an eligible category on the date of the runoff election shall be eligible to vote in the runoff election."

ing out that April 7 appeared to be the earliest possible date on which such an election could be conducted. Claiming that it anticipated a change in employment because of labor turn-over, it asked the Board to fix March 27 as the eligibility date, although this would be, as it said, "a departure from normal proceedings" (R. 115–116). On March 20, the Union sent the Board a letter in which it opposed any change in eligibility date on the ground that its interest lay with "those stable, regular employees, and not with those who will probably be gone before the election is held," and also because a change would be at variance with Board practice (R. 118). Relying upon its precedents and Rules, the Board, on March 26, denied the Company's application (R. 119–120).

The run-off was held on April 7 with employees who had been eligible to vote in the first election and who were still employed on April 7 eligible to vote (R. 121). The Union won the election by a substantial majority; there were 196 votes for, and 149 against, the Union, with 5 ballots challenged and 4 void (R. 130).

On April 14, the Company filed objections to the run-off election on the ground that the February 27 eligibility date was "too remote from the date of the [run-off] to allow a truly representative election to be held, the records of the Company revealing that from * * * February 27, 1954, to the eligibility date requested by the Company, to wit: March 27, 1954, 87 employees left the employment of the Company and 99 new regular employees were hired" (R. 132–133).

The Acting Regional Director on April 16 issued a report on the objections in which he recommended

that the Board overrule them and certify the Union (R. 135–138). Sustaining this Report, the Board in a Supplemental Decision and Certification issued on July 27, 1954, unanimously adhered to its order of March 26, in which it refused to modify its precedents and run-off rule by altering the February 27 eligibility date; and it certified the Union as the exclusive bargaining representative of all employees in the appropriate unit (R. 148–151). The Board stated that "material deviation from the rule set forth in Section 102.62, *supra,* is not warranted and would not be consistent with good administration of the Act" (R. 150).

In the ensuing unfair labor practice proceeding, the court below sustained the Board's action in adhering to the original eligibility date as "eminently fair and just" and as a "reasonable and practicable adjustment in the election machinery to assure a free and just result by avoidance of the opportunity or temptation to manipulate the electorate through purposeful hirings or firings by either union or employer" (Pet. 19). Quoting this Court's observation in *National Labor Relations Board* v. *A. J. Tower Co.,* 329 U. S. 324, 331, that "The principle of majority rule * * * does not foreclose practical adjustments designed to protect the election machinery from the ever-present dangers of abuse and fraud," the court below noted that the Board's eligibility rule in this case conformed to the rules governing run-off primaries in Florida, where this election was held, and held that "impartial application of the [Board's] long-time rule was not arbitrary, unreasonable action" (Pet. 20). Having thus upheld the Board's certifica-

tion, the court held that petitioner's failure to honor the certification violated the Act, and accordingly the court enforced the Board's bargaining order (Pet. 21).[4]

ARGUMENT

The Board's rule that the same eligibility date shall be used for a run-off election as for the original election, accepted without previous challenge since its inception in 1939,[5] was properly sustained by the court below as a reasonable exercise of the Board's "wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *A. J. Tower, supra,* 329 U. S. at 330.

Adoption of an eligibility date in advance of the election date serves in Board elections, as in political elections (cf. *Tower, supra,* 329 U. S. at 331), to enable verification of the legitimate interests of prospective voters, to permit resolution of eligibility issues before the election, and to allow informal challenge at the election. Thus an advance eligibility date helps to eliminate confusion, fraud, and abuse at the polls, and

[4] The court overturned the Board's findings that petitioner had violated the Act in other respects (Pet. 21–25), and no review is sought of those aspects of the case.

[5] First used as a "rule of decision" in 1939 in *Aluminum Co. of America*, 13 N. L. R. B. 79, 81, the rule was set forth as early as 1943 in Sec. 11 (b), Art. III, N. L. R. B. Rules and Regulations, Series 3, effective November 16, 1943. It has been invoked against labor unions which requested a later eligibility date (*Standard Coil Products Co.*, 101 N. L. R. B. 261; *Reed Roller Bit Co.*, 61 N. L. R. B. 867) as well as against employers who made similar requests (*Jasper Wood Products Co.*, 75 N. L. R. B. 808).

it helps to insure a fair election even though it disfranchises prospective voters who appear on the scene between the eligibility date and election day.

Similar considerations underlie the choice of an advance eligibility date in a run-off election. Once the results of the original inconclusive election become known, moreover, such knowledge could perhaps disclose how some slight manipulation of the voters' roster might produce a desired result. Furthermore, this information may lend encouragement to jockeying for position among the parties, who may seek changes in the eligibility date, not in the interest of the voters, but at the expense of the integrity of the election process. To this extent, there is need in conducting a runoff, not only for an advance eligibility date, but for the very date that governed eligibility in the original election. Adherence to the original date which served for one election helps speed the conduct of the runoff,[6] makes for certainty and fair dealing, aborts possible artificial shaping of the electorate, and reduces to a minimum maneuvering impelled by self-interest rather than the interest of the voters as a whole. Particularly where, as in the instant case, the run-off election follows by only three weeks the original election, precisely as in the Florida run-off primary (Pet. n. 8), the administrative rule so closely paralleling

[6] When the Company, on February 3, asked the Board to extend the time for running the original election, it mentioned obstacles in the way of satisfactory election arrangements (*supra*, pp. 3–4). Utilization in the run-off of the original eligibility date eliminated additional problems which might have arisen from use of another period and consequently expedited the holding of the runoff.

that used in state elections cannot be fairly characterized as arbitrary or capricious or in excess of the Board's powers.

Petitioner, setting forth the disfranchisement of 99 employees as its primary ground for seeking the writ, overlooks the fact that these new employees would have been equally disfranchised had the first election resulted in a Union majority. Moreover, disfranchisement is the inevitable consequence of a potential voter's arrival within the jurisdiction after the registration lists are closed. The question whether this detriment is outweighed by the advantages of adherence to the original eligibility date is committed to the sound discretion of the Board. *Tower* case, *supra*. Petitioner claims that its privately conducted poll showed a majority opposed to the Union. But the poll, which at best tested only the extent of union *membership* and not whether the employees desired union *representation* (Pet. 18, n. 5; R. 198, A. 65–66, 75–76), casts no more reflection on the validity of the certification (which had been in effect for only two weeks when the poll was taken) than is cast by a petition in which a majority repudiates the certified union during the operative period of the certification. *Brooks v. National Labor Relations Board*, 348 U. S. 96.

Finally, petitioner suggests (Pet. 10–11) that the Board, in the event that a second election is required, ordinarily selects a new eligibility date for the second election, and that its failure to do so here was arbitrary and discriminatory. But none of the cases cited by petitioner involved a run-off election; and, as the court below observed (Pet. 19, n. 7), different con-

siderations prevail when an election is vacated for irregularity or misconduct, in which event the Board orders what is tantamount to an original election, from those which govern where, as here, the Board merely conducts a second step in the holding of a valid election.

CONCLUSION

The decision of the court below sustaining the Board's heretofore unchallenged rule is plainly correct, does not conflict with any other court of appeals' decision, and presents no issue warranting review. The petition for writ of certiorari should therefore be denied.

Respectfully submitted,

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OCTOBER 1956.

APPENDIX

1. The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), are as follows:

NATIONAL LABOR RELATIONS BOARD

SEC. 6. The Board shall have authority from time to time to make, amend, and rescind in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act.

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7; * * * (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

* * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:

* * * * *

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

* * * * *

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. * * * If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

(3) * * * In any election where none of the choices on the ballot receives a majority, a runoff shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

2. The relevant Rule of the National Labor Relations Board, Section 102.62 (b), 29 Code of Federal Regulations 102.62 (b), 12 Fed. Reg. 5664, adopted pursuant to Section 6 of the Act, is as follows:

SEC. 102.62 RUNOFF ELECTION

* * * * *

(b) Employees who were eligible to vote in the election and who are employed in an eligible category on the date of the runoff election shall be eligible to vote in the runoff election.

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